NEITHER AUTHORIZED NOR PROHIBITED? SECESSION AND INTERNATIONAL LAW AFTER KOSOVO, SOUTH OSSETIA AND ABKHAZIA

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1. EFFECTIVENESS VS. LEGALITY IN THE CREATION OF STATES: AN ONGOING DEBATE

Over the past few decades, phenomena of secession have triggered a vast debate about two main questions. First, does a violation of peremptory norms of international law affect the validity of legal facts, as well as legal acts, so that “international law may justifiably treat an effective entity as not a State”? 1 Secondly, does a State that grossly and continuously abuses its sovereign powers against a part of its population forfeit the right to claim respect for its own territorial integrity?

Answers to these questions differ as they reflect divergent doctrinal approaches on statehood in international law.

“Realists” maintain that the creation or extinction of States is – as stated by the Arbitration Commission instituted by the European Community’s Conference for Peace in Yugoslavia, in its Opinion No. 1 of 29 November 1991 2 – “a question of fact”, from which legal consequences arise. Once created on the mere basis of effectiveness and independence, States automatically become the addressees of international norms. Therefore, international law neither creates States through its rules, nor discriminates between “good and bad” entities, by attributing legal status or personality to the former and not the latter. Drawing on these theoretical premises – widely held, for instance, in Italian international legal doctrine 3 – secession is usually deemed a historical occurrence, neither authorized nor prohibited by international law.

“Legalists” on the other hand, maintain that the basic values enshrined in the international legal order cannot be protected if the only basis for statehood is effectiveness. Accordingly, it is time to regard legality as an additional requisite for state-

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This view mainly hinges on the idea – commonly maintained in the Anglo-American scholarly tradition – that statehood is a legal status, attributed (or denied) on the basis of international law. To quote Lauterpacht, “[…] facts, however undisputed, which are the result of conduct violative of international law cannot claim the same right to be incorporated automatically as part of the law of nations.” Drawing on this background, these writers tend to admit that when peremptory norms are violated in the process of State-creation, then, an entity otherwise effective is prevented from being regarded as a State, since *ex injuria ius non oritur*.

The “remedial secession” theory is based on similarly deductive reasoning. According to Tomuschat, for instance,

> “Within a context where the individual citizen is no more regarded as a simple object, international law must allow the members of a community suffering structural discrimination – amounting to grave prejudice affecting their lives – to strive for secession as a measure of last resort after all other methods employed to bring about change have failed”.

Thus, a consequence of the views postulating the incidence of principles of legality on the creation of States is that secession may be *both* authorized and/or prohibited by international law.

The object of this work is to assess the persuasiveness of competing views briefly expounded in the light of the events regarding Kosovo, South Ossetia, and Abkhazia. The year of secessions – as 2008 will probably be remembered – has in fact provided significant indications regarding the current attitude adopted by States and international organizations in this field. The methodological approach employed will be mostly inductive.

2. (N)either Authorized...? Some Critical Remarks on the “Remedial Secession” Theory Before Kosovo, South Ossetia and Abkhazia

According to the proponents of the right to “remedial secession”, the principle of self-determination of peoples could be invoked as a legal title and as an *ultima ratio* to create statehood in cases of extreme persecution. In this perspective, the traditional conflict between the self-determination of peoples and the territorial in-

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